# United States Court of Appeals for the Second Circuit



# APPELLEE'S BRIEF

# 76-6122

To be argued by JON M. KAUFMAN

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6122

COUNTY OF SUFFOLK, COUNTY OF NASSAU, ET AL., Appellees,

-against-

SECRETARY OF THE INTERIOR, ET AL., Appellants,

NATIONAL OCEAN INDUSTRIES ASSOCIATION. ET AL. and NEW YORK GAS GROUP, Intervenor-Appellants.

THE STATE OF NEW YORK and THE NATURAL RESOURCES DEFENSE COUNCIL, INC.,

-against-

THOMAS S. KLEPPE, Secretary of the Interior,

Appellant.

NATIONAL OCEAN INDUSTRIES ASSOCIATION ET AL. and NEW YORK GAS GROUP,

Intervenor-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF OF APPELLEE** NATURAL RESOURCES DEFENSE COUNCIL, INC.

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UNITED STATES COURT OF APPEALS

FOR THE SECOND DISTRICT

THOMAS S. KLEPPE, SECRETARY OF
THE INTERIOR, et al.,

Defendants-Appellants,

Case Number
76-6122

COUNTY OF SUFFOLK, et al.,

Plaintiffs-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF APPELLEE
NATURAL RESOURCES DEFENSE COUNCIL, INC.

#### **JURISDICTION**

On August 13, 1976, the United States District Court for the Eastern District of New York (Judge Jack B. Weinstein) issued a 79-page opinion and order of injunction, temporarily restraining, pending trial of the action, Appellant Secretary of the Interior from holding Outer Continental Shelf Oil and Gas Lease Sale No. 40 (Mid-Atlantic) then scheduled for August 17, 1976. (J.A. 10-89)

Appellant Secretary, joined by intervenor defendantsappellants National Ocean Industries Association (NOIA), a
trade association representing the sixteen major oil producers

and their satellite companies in the oil industry, and New York Gas Group (NYGAS), a trade association representing natural gas distributors on the East Coast, thereupon filed notices of appeal, invoking this Court's jurisdiction under 28 USC Sec. 1292(a)(1) to review Judge Weinstein's order. At the same time, appellants on August 13, 1976 moved this Court for a stay of the District Court's order pending the appeal.

On August 16, 1976, a panel of this Court, (Circuit Judge Van Graafeiland, and District Judges Gagliardi (SDNY) and Kelleher (CDCAL) sitting by designation) heard and granted appellants' motion, holding that the event of the lease sale, "in and of itself" would not cause irreparable injury. The Court indicated, particularly in colloquy with counsel during argument, that should the order and opinion of the District Court be affirmed, any leases that might have been entered into as a result of the sale would be terminable by the Court, especially since they were entered into with full knowledge of the parties to the leases of the pendency of the issues now before this Court.

In staying Judge Weinstein's order, the Court directed that the record and briefs be filed on scheduled dates, and that argument would be heard the week of September 27, 1976.

The following day, plaintiffs-appellees applied to Justice Thurgood Marshall, as Circuit Justice for the Second Circuit,

requesting him to vacate the stay embodied in this Court's order of August 16, 1976, which would thus have left the District Court's temporary injunction in effect. Justice Marshall heard oral argument, and orally announced on August 17, 1976 that he would not vacate the stay. He followed this announcement with a written decision issued on August 19, 1976, (42 U.S.L.W. 3161, JA 212), in which he specifically pointed out that any lease entered into by appellants might well be invalid if this Court determines that the government entered into leases without compliance with the requirements of NEPA.

#### QUESTION PRESENTED

The District Court's opinion <u>held</u> that Appellant Secretary of the Interior had violated the mandates of the National Environmental Policy Act (NEPA) on a complex matter involving state-federal relationships and possible state-federal conflicts of major significance. (42 USC § 4321 et seq.)

Specifically, on this issue, the Court held:

These controls on land development along the coast will mean that much of the onshore activity that will accompany OCS exploratory drilling and production will be regulated and subject to approval by the states. Without more coordination between the states and the federal government it is impossible to predict with accuracy the impact OCS development will have on the seashore. Certainly the information the Secretary had at the time of his decision to proceed

with Sale No. 40 did not permit a sound judgment as to what the five states affected by the sale would sanction.

\* \* \*

Without analysis of these state provisions and of the probable extent of state cooperation or opposition a realistic appraisal of the impact of Sale No. 40 is not possible. No meaningful discussion of this vital dimension of the environmental problem is contained in the final EIS OCS No. 40 or the PDOD. Cf. Final EIS OCS Sale No. 40, Vol. 1, pp.42-49, 58-61, Vol. III, p. 154. This failure, even though it did not constitute a violation of the [Coastal Zone] Management Act, did violate NEPA."

The question presented here is did the District Court abuse its discretion in holding that the omission from the impact statement of the "meaningful discussion" of the budding conflict between state land use policies and federal GCS development policy is a violation of NEPA.

Secondly, the District Court also found:

- (a) That "plaintiffs have demonstrated that they are entitled to preliminary injunctive relief" (J.A., 83 )
- (b) That "under any standard of harm, plaintiffs have demonstrated more than the required possible irreparable harm" (J.A., 84)
- (c) That the **danger** of the irreparable harm was immediate (J.A., 84 )

- (d) That "the damage, if any, to the federal government from a preliminary injunction would be slight" (J.A, 85-86 ) and
- (e) That "loss of possible profits by the individual defendants is not enough to warrant denial of NEPA relief".(J.A., 86 )

The question is thus also presented here of whether the Court abused its discretion in granting the preliminary injunction.

#### STATEMENT OF THE CASE

This proceeding started in District Court as two separate cases.

The first action was brought in February, 1975, by the Counties of Suffolk and Nassau, New York, and by five towns within their borders, all of which have extensive valuable coastlines and wetlands placed at risk by the Secretary's proposed program to develop the oil and gas resources of the Baltimore Canyon section of the Outer Continental Shelf, which lies off the coasts of New York, New Jersey, Maryland and Delaware. The Concerned Citizens of Montauk, Inc., a citizens group, was permitted to intervene as a plaintiff after the action started.

The second action was brough on June 29, 1976 by the State of New York and the Natural Resources Defense Countil, Inc. (NRDC), an environmental organization with over 25,000

members throughout the nation, many concentrated in the Middle Atlantic states which will be most affected by the exploration for oil, and by the discovery and development of oil and gas directly off their coasts.

In both complaints, plaintiffs sought to enjoin the defendant Secretary from proceeding with Lease Sale No. 40, and from further pursuing the vast national program of developing the potential billions of barrels of oil and trillions of cubic feet of gas under the Outer Continental Shelf (OCS) over a 25-year period, for the reason that the Secretary had not complied with the mandates of NEPA, the Outer Continental Shelf Lands Act, and various other relevant statutes governing the OCS area and activities related thereto.

Immediately upon the filing of the second action, it was assigned to Judge Weinstein, who had the first case, and he promptly consolidated the cases for purposes of discovery and for pre-trial hearing at a pre-trial conference on June 20, 1976.

On July 15, 1976, plaintiff-appellees, the State of New York and NRDC filed a motion for a preliminary injunction, following the Secretary's announcement that it was his intention to hold Lease Sale 40 on August 17, 1976, on the grounds that (a) the Secretary had indeed violated NEPA and the other relevant statutes, (b) that injunction is the proper remedy for NEPA

violations and (c) they would suffer irreparable harm if leases were issued vesting rights to develop oil and gas discoveries in violation of NEPA. The motion papers pointed out that the Secretary's violation of NEPA was three fold, in that (a) He had failed to prepare, publish and circulate an adequate impact statement, (42 USC §4332 (2)(c) (b) He had failed to adequately consider the adverse impacts of the proposed program, and especially Lease Sale 40, or to adequately consider the cumulative impacts and alternatives to the program, (42 USC §4332(2)(E) and (c) He had failed to follow the substantive dictates of NEPA (42 USC §4332(2)(B). The other plaintiffs joined in the motion.

On July 20, 1976, one of the oil industry's trade associations, NOIA, and the New York Gas Group (NYGAS) were permitted, on motion, to intervene. Evidentiary hearings began on the preliminary injunction motion on July 23, and continued through August 6, 1976. On the record day of trial, Citizens' Association for the Protection of the Environment, a Cape May County, New Jersey citizens' organization, was permitted to intervene as a plaintiff.

The context of the hearing had some significance for the decision. The Secretary's national program to accelerate the leasing of oil and gas resources of the Outer Continent Shelf began running into opposition early. Starting in 1975, opposition to the program came from state and local governments in California

and Alaska as well as this case in New York. Thus, as this matter approached hearing, there had clearly developed a rising tide of opposition to the Secretary's intransigent pursuant of his accelerated program irrespective of who objected, or why. This growing opposition was found in the coastal areas most likely to be adversely affected by the Secretary's actions and most worried about damage to their fishing, wetland and recreation areas, the quality of life of their people, and the substantial industries the coastal resources support.

The focus of the opposition around the country has not been to the drilling for oil per se, nor has it been in this case. The focus has been on the failure of the Secretary to provide that the drilling and devlopment he allows is done with adequate safeguards. NRDC does not oppose offshore oil and gas development; its goal is to assure that this significant federal program which will affect coastal lands and resources for the next 25 years is done right and without degradation to the already stressed environment.

Several of these latter cases had just been tried, or were in process of trial during the time the hearing in the District Court

<sup>1/</sup> People of California v. Morton, 404 F. Supp. 26 (C.D. Cal. 1975)
on appeal, (9th Cir.); Public Citizen v. Morton, (D.D.C. Civ. No.
74-739 1975); Southern California Association of Governments v.
Kleppe, 8 E.R.D. 1922 (D.D.C. 1976); State of Alaska v. Kleppe,
9 E.R.C. \_\_\_\_\_ D.D.C. August 13, 1976 on appeal D.C. Civ.

took place, and they were repeatedly brought to Judge Weinstein's attention by defendants. These cases, which graphically illustrate the growth of opposition to the accelerated leasing program, of which Lease Sale 40 is a part, were mentioned by NOIA in its brief seeking intervention, in its trial memorandum, and in virtually every other memorandum submitted by defendants. They surely helped to illuminate for the District Court's consideration the central fact around which he eventually decided the case,—that is, that there is significant and well-founded opposition to this program, that it is likely to show up in various kinds of state or local permit and regulation actions, that these actions may cause adverse environmental impacts, and that the Secretary failed both adequately to discuss this problem in the impact statement, or to consider it—which failures were in violation of NEPA.

During the hearing, it became apparent that the onshore development of oil and gas discoveries requires permits of all kinds, and of the most complex nature. For example, NRDC's witness, Professor Mitchell of Rutgers (J.A.307-401) testified about the development and siting of yards in which the sixty story platforms required for OCS development are built before being floated to sea and about the location, siting demands, pollution problems and planning problems related to pipelines, gas processing plants, pumping stations, refineries, petrochemical plants, factories downstream from gas processing

plants using sulfur, or ethelyne compounds, or other crude by-products and other facilities the oil and gas industry generates. Most, if not all, of these onshore facilities, Mitchell testified, will locate in coastal areas, near where the oil and gas is being developed. Most, if not all, will require fresh water and water use permits, waste water disposal facilities and permits, solid waste disposal facilities and permits, harbor dredging and permits, air pollution permits, and, of course, zoning and building permits. Most, if not all, of these permits are governed by state or local law and decisions by state or local authorities to deny or restrict such permits can produce serious confrontations within the offshore development program. Professor Mitchell testified that conflicts between state and federal governments over these problems of development had already arisen in California. (J.A. 428, ) and in Scotland (J.A. 454 and were likely to arise in the Mid-Atlantic ./ Mr. Jarmar, the Cape May County, Director of Planning, testified (J.A. 680 ) that such a dispute was likely to arise in Cape May County and in Cape May-Atlantic-Ocean County coastal area of New Jersey, the very area where the Interior Department had indicated three pipelines would probably be brought ashore.

The only witness whose testimony bore on onshore facilities, Wenstrom (J.A. 788-92, 795-797) a witness for NOIA, was compelled to admit on cross-examination that his calculations of the extent of the onshore impacts (which would most frequently be the cause of the confrontations) were in most cases not very different from those of Dr. Mitchell, plaintiff's expert.

Indeed, contrary to what appellants claim, the Court did not raise the issue of active local opposition to the Secretary's proposed program sua sponte at all—it was brought home to him forcefully by appellants themselves as well as by appellees in their comments on the ETS in testimony at the hearing, and in their briefs.

At almost the same time that the hearing began, the President signed into law the 1976 Amendments to the Coastal Zone Management Act (CZMA) which legislation touched on the issues being raised at the hearing. Counsel on both sides briefed the amendments in response to the Court's questions whether the state might not use their powers to block pipelines or related onshore facilities, such as processing plants, desulfurization plants, refineries and downstream petrochemical plants in these coastal zones. (J.A. 423)

In its opinion, the Court found that the states might

certainly do just that, and found:

'The CZMA suggests the nature of a substantial question as to the reliability of the decision-making regarding Sale No. 40. State planning under the Management Act and state laws may well negate some of the primary assumptions upon which the Secretary of the Interior based his decision to proceed with leasing. If this is so, then the leasing decision subverts the prpose of NEPA."

(J.A. 45)

Another major purpose of the Court in the examination of the 1976 CZMA Amendments was to see how the Congress and the President were regarding these state regulatory powers—whether inter alia, they had chosen to try to limit them, or otherwsie restrict the states capacity to oppose onshore aspects of the program. In looking at this question, the Court satisfied itself that in amending the CZMA, Congress had no such intent, and that in addition to being enabled to receive financial assistance for the planning activities under the CZMA and aid where areas became burdened by development, the states did indeed retain unfettered organic authority to control the pace and quantity and quality of development on and near their coastal lands, and even to prevent it if they so choose. (J.A. 64)

Having recognized both that the power of the states to cooperate or not cooperate is not restrained, and that it might well be used not to cooperate, the Court looked to see if there were any "meaningful discussion" of the problem in the impact (JA 76) statement, and found indeed there was none. The Court found that

the few brief comments in the EIS to the effect that if sates oppose pipelines, tankers will be used, was not the meaningful discussion NEPA requires.

Accordingly, the Court found in issing its decision and injunction on August 13, 1976, that there had been "no discussion and apparently no real awareness of the fact that state laws may severely restrict pipelines and related onshore facilities". (J.A. 73 ) This omission constituted a "material error or assumption regarding the environmental impact". (J.A. 81 ).

The Court found that in all six affected states there are departments established "to oversee their shorelines and other environmental treasures" (J.A. 73 ). He found them to be "active, powerful government units" (J.A. 73 ) with recently "amplified powers" (J.A. 73 ) and with "vitality" derived from their "broad functions" (J.A. 74 ). The Court found that "The real bite in the environmental control exercised by the states is...in their licensing capacity," (J.A. ) and discussed the controls just before specifically finding, as set forth above, that the failure to analyze these controls and their likely effect on the program is a viclation of NEPA.

The Court stated:

"But, when it can be shown that an assumption the Secretary considered material to the decision is invalid or that available information needed for informed decision was not properly presented, then the decision must be reconsidered." (JA 81) INTRODUCTION AND SUMMARY OF ARGUMENT In finding a violation of NEPA and entering a preliminary injunction against the Secretary, the District Court did not abuse its discretion, nor did it make a clear mistake of law. Reduced to its essential elements, the opinion in the District Court finds: (1) A group of laws exists in each state affected by Lease Sale 40, which can be used to alter the character of the offshore oil and gas program in ways which may well be negative. (2) The Interior Department knew that some or all of these laws exist, because at least some of them were mentioned in the impact statement. (3) The Interior Department knew, from the litigation that exists and from the activity in Congress dealing with coastal zone management, that there is great interest in OCS oil development, that there is active state and local opposition to the accelerated leasing program as presented, and that this opposition may well result in the application of the aforesaid laws and powers in a way that may have adverse environmental effects. Despite this, the Secretary utterly failed to -14analyze the range of options open to the states and localities under these laws and the effects that their use in a confrontation situation would have on the character of the leasing program or the environment. Instead, the impact statement relied on the dubious proposition that the states and localities will not utilize their powers in such manner.

- (4) If the impact statement had made this analysis, it might well have reached a material assumption with respect to pipelines and onshore impacts, different from the one it did reach! The Secretary, in consideration thereof, may have structured the leasing program differently as a result.
- (5) Thus, the failure to analyze the state laws and how they may be used is a violation of NEPA, in that it must be both detailed for the public and considered by the Secretary and it was neither, so that Lease Sale 40 must be halted.

Stated in this manner, the District Court has clearly put its finger on an issue central to the government of the nation throughout its history -- the issue of federalism, and the relationship of the division of powers between the states and the national government.

The Court was quite right in criticizing the EIS for failure to include "meaningful discussion" of the consequences of state cooperation or failure to cooperate with the program, especially with respect to use of pipelines as against tankers, as with respect to other onshore facilities. It was certainly not an abuse of discretion to so find.

There are many ways the Department of the Interior could have chosen to analyze the problem and inform the public, rather than ignore it. Mention of a few examples reveals the extent to which the EIS was lacking, and how the Secretary as well as the public were not adequately informed.

For example, a meaningful discussion of the consequences of an exercise of state power to block pipelines should certainly have pointed out that if oil pipelines are restricted and tankers are used, the natural gas from that collection system may be lost to the consumer distribution system, and instead be pumped back down the wells, thus doing nothing to alleviate the alleged natural gas shortage about which derendants raised such a hue and cry.

As another example, a meaningful discussion of this same question should have pointed out, as plaintiff's witness Dr. Mitchecll did, (J.A. 429) that should states or localities restrict onshore facilities, the Secretary has it within his power to permit the lessees to use very dirty old converted tankers as gas and oil separation plants moored right outside the three mile limit, thus greatly increasing the risk of damage from oil spills.

As a third example, a meaningful discussion of this same question should have pointed out that the use of tankers instead of pipelines would require the construction of vast storage tanks under the platforms, thus altering greatly the nature of the risk from spills, since in the event of a collision involving a large vessel and a platform storage facility, the damage could be devastating.

Another example of the kinds of matters that should have appeared at a minimum in the EIS is the fact that states may be willing to accept some, but not all, of a lessee's plan for development, as took place in California. (J.A. 430)

For example, a state might be willing to accept a pipeline and a gas processing plant, but not a downstream petrochemical plant because of its adverse secondary impacts, such as demand for water. A processor might well thereupon claim the pipeline is uneconomic without the downstream plant and seek to bring oil ashore by tankers and use the gas for other purposes.

As a final example, state regulation could well funnel development into a state with less stringent controls, to the whole region's detriment. It is easily conceivable, for example, that a state seeking industry to support a lagging economy could use its laws to create a line of tankers going by the shorelines

of all six of the Mid-Atlantic states headed for a new refinery and petrochemical complex that the state permitted to be built.

Additional variations in the manner in which state laws might be used in conflict with the desires of the federal government and its oil lessees can be constructed too -- but these are sufficient to illustrate that the issue is a major one and was not adequately considered in the EIS.

The Court's application of NEPA was not mistaken. The Court correctly understood that it is the strong policy of this Circuit that all important national policy matters are subject to NEPA, NRDC v Nuclear Regulatory Commission, F. 2d , (2d Cir., May 26, 1976) rehearing denied, F.2d (2d Cir., Sept. 8, 1976) NRDC v. Callaway, 524 F. 2d 79 (2d Cir. 1975), and that OCS oil is no exception. A finding that the impact statement is inadequate because it is based on incorrect, incomplete information or dubious assumptions meets the standards of the rule of reason.

It is important to point out that appellants have ignored a vital dimension of the opinion of the Court below. Appellants have limited their entire argument to the question of pipelines against tankers. They have failed to recognize that this issue was an example posed by the Court, and not intended to be the only problem. The Court below clearly understood that the restrictions which states can place on the location or equipping of other onshore

facilities could cause the same kinds of confrontations that pipelines versus tankers can cause. Appellants, by confining themselves to the pipeline discussion have imposed both a warped view of the Court's opinion, and an improperly limited one as well. A state or locality's decision to prohibit location of a separating plant or refinery in its jurisdiction could produce exactly the same kind of confrontation that the pipeline/tanker controversy can produce and could also aggravate the adverse environmental effects of the leasing program. The problem which concerned the District Court, therefore, may not be narrowly construed as appellants argue.

Appellees also argue that the record below adequately supports the District Court's finding that the Secretary violated NEPA in that the impact statement failed adequately to detail or to consider the adverse environmental impacts of Lease Sale 40, its cumulative effects and its alternatives.

Lastly, the preliminary injunction was properly granted, for without it, irreparable injury will be suffered by the environment if the lessees are able to commence drilling without prior compliance with NEPA. Options which should be open to the Secretary after such compliance would otherwise be precluded. Among options which would be precluded would be (a) including in the leases a stipulation requiring pipelines

for all transport, with adequate safeguards; (b) imposing strict liability on lessess for all spills; (c) delaying oil and gas development, as opposed to exploration, until the amount of oil is determined and state plans can be enacted and made effective; and (d) leasing tracts different from those presently being leased.

Thus, irretreivable commitments of resources will take place if leasing is permitted to go forward.

### ARGUMENT

I

THE DISTRICT COURT'S GRANT OF A PRELIMINARY INJUNCTION SHOULD BE SUSTAINED ABSENT A FINDING OF AN ABUSE OF DISCRETION OR A CLEAR MISTAKE OF LAW

The standard for reversal of a grant or denial by a district court of a preliminary injunction has been clearly enunciated in this Circuit. To be reversed, a district court must have made a clear mistake of law, or have abused its discretion. The standard has been articulated many times by this Court, following Dino De Laurentiis Cinematografica S.p.A. v. D-150 Inc., 366 F. 2d 373 (2nd Cir. 1966) and Herbert Rosenthal Jewelry Corp. v. Grossbardt, 428 F. 2d 551 (2nd Cir. 1970), Stamicarborn N.V. v. American Cyanamid Co.,506 F2d 532 (2d Cir. 1975), Greshaw v. Chambers, 501 F. 2d 687 (2nd Cir. 1974); 414 Theatre Corp. v. Murphy, Comm'r., 499 F.2d 1155 (2d Cir. 1974); Exxon Corp. v.

City of New York, 480 F. 2d 460 (1973).

In Exxon, supra, the Court wrote:

"While we do have the power to reverse the lower court's denial or grant of preliminary injunctive relief where there is an abuse of discretion or a clear mistake of law, Dino DeLaurentiss Cinematografica, S.p.A. v. D-150 Inc., 366 F. 2d 373 (2d Cir. 1966); see 7 J. Moore, Federal Practice ¶65.04[1], at 65-35 to 65-36 (2d ed. 1972)...we do not believe that course is appropriate here."

In 414 Theatre Corp., supra, the Court again stated:

"And we must review its conclusion on the basis of whether there has been an abuse of discretion or a clear mistake of law. Exxon Corp. V. City of New York, 480 F. 2d 460 (2nd Cir. 1973)"

This rule is followed by other circuit courts as well.

Grubbs v. Butz, 514 F. 2d 1323 (DC Cir. 1975); Coalition for Responsible Regional Development v. Brinegar, 518 F.

2d 523 (4th Cir. 1975); Conservation Council of North Carolina v. Castanzo, 505 F. 2d 408 (4th Cir. 1974); West Virginia Highlands
Conservatory v. Island Creek Coal Co., 441 F. 2d 232 (4th Cir.

1971). In Coalition v. Brinegar, supra, the Court wrote:

"Appellate review in a case of this nature is limited to a determination of whether the district court abused its discretion in denying interim relief."

In determining whether the Court below made a mistake of law or abused its discretion, this Court must look to the requirements for preliminary injunctive relief.

The general test for preliminary injunctive relief in a District Court in this Circuit was set forth in Sonesta International Hotels Corp. v. Wellington Associates, 483 F. 2d 247-250 (2d Cir. 1973):

'The settled rule is that a preliminary injunction should issue only upon a clear showing of either (1) probable success on the merits and possible irreparable injury, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a blance of hardships tipping decidedly toward the party requesting the preliminary relief." (Citations omitted; emphasis in original.)

The oil industry appellants have misconstrued the breadth of review to which they are entitled. NRDC and the State of New York brought the action on which the preliminary injunction was made only three weeks before the hearing began. NRDC did not have "full discovery", and "full trial". It may well be that further evidence of the failure of the Secretary to meet NEPA's standards will be introduced by NRDC at the full trial, and that further discovery will be needed.

It should be noted that the federal appellants brief does not argree with NOIA and that they argue only that the Court below abused its discretion.

As appellee NRDC demonstrates herein, the Court below properly found that plaintiffs-appellees had established a reasonable likelihood of success on the merits because the

Secretary had violated NEPA, and that plaintiffs-appellees would suffer irreparable harm unless a preliminary injunction was granted.

#### II

IN REACHING ITS CONCLUSION THAT NEPA HAD
BEEN VIOLATED AND THAT PLAINTIFFS WERE THUS
LIKELY TO SUCCEED ON THE MERITS
THE COURT DID NOT ABUSE ITS DISCRETION

Specifically, the Court found that the EIS contained a material proposition that is questionable at best, and probably wrong. The Court found that the Secretary had concluded that pipelines would bring the oil ashore, and other onshore facilities would be built, without detailing and considering, as he is required to do under NEPA, what the effect on this program would be of a whole body of existing state laws that permit obstruction and restrictions on the program, and which may well be used against it.

In making this finding, the District Court was correct and thus did not abuse its discretion. The logic and significance of the District Court's finding that the problem of state and local land use policy confronting federal oil development policy is a "vital dimension" of the program and must be included in the impact statement is so compelling that the oil industry appellants, NOIA, have contorted themselves, often in opposite directions, to try to demean or vitiate it. They have

argued that the state-federal policy disagreements are an "almost imaginary issue," not a "vital dimension" of the impacts as described by the Court; they have argued that the issue is "strained and artificial"; they have argued the opposite--that to handle the issue the Secretary would be reduced to an "impossible level of detail"; they have argued that the Court raised the issue <u>sua sponte</u>, and that it may not; they have argued that appellees did not raise the issue in their EIS comments, which excuses the Secretary from considering it; lastly they argue that the raising of the issue by the Court below violated the "rule of reason". In all of these claims appellants are wrong.

The oil industry is not a government. To it, a confrontation over conflicting public policies between a soverign, organic body like a state and the equally sovereign body (in a matter involving exclusive jurisdiction, like offshore oil) of the federal government may be an "imaginary issue," which is "strained and artificial," but to the participants, it clearly is not.

Within recent years, the Mid-Atlantic states have begun to recognize the great value of their coastal resources and wetlands, which the Court also recognized.

"Because of the barrier islands like Fire Island lying along the Northeast coast, bays like Great South Bay in Long Island, deep wetlands and beaches such as those in New Jersey's Cape May County and huge estuaries with their many bays and inlets such as those leading from the Baltimore and Hudson canyons in the OCS, the area involved is of enormous size and importance. Millions of people reside, work and play within its bounds; much of the nurseries of the Atlantic fisheries are located there; its destruction or serious damaging would result in loss of economic and aesthetic values at least comparable to the value of the Atlantic OCS hydrocarbon resources." (J.A. 47)

To protect these resources from degradation, the states have therefore passed legislation, which was cited at length by the Court (J.A 90-209) and in the appendix to its opinion. The onshore developments engendered by offshore oil discoveries threaten degradation of the very same resources these state laws seek to protect.

As illustration of this threat, the Court below discussed the Report of the Senate Committee on Commerce, 94th Congress, 1st Session, No. 94-277 (1975), which states:

There is a strong likelihood of adverse, often severe, impacts within coastal regions resulting from unplanned, uncoordinated energy resource development and from the siting of facilities related to energy production, development, and utilization. (J.A. 53)

The Court then stated:

"Congress also recognized the very same land use and socio-economic disruptions described by a number of witnesses before this court that would probably result from the magnitude and compressed timing of the impacts:

'In addition to the visible ecological damage in Louisiana wetlands, other experiences in that

State create concern in coastal areas facing oil development for the first time. For instance, 80 per cent of all investment in Louisiana's new manufacturing facilities between 1938 and 1971 took place in coastal parishes (counties), reflecting support activities for offshore petroleum development. A total of \$5 billion was invested in petrochemical industrial facilities in Louisiana's coastal zone during those years, with over 100 major petroleum and petrochemical plants placed in coastal parishes.' (J.A. 55)

\* \* \*

'There are signs, even before the first Federal lease sale is held off Alaska, that these impacts are beginning. ...Rumors of speculative land purchases abound, and local citizens report sudden increases in land values. ...'"

(J.A. 56)

Specifically with respect to lease Sale 40, the Court below found:

"Even as heavily an industrialized state as New Jersey would experience significant interference with its remaining natural terrain. Substantial testimony credited by the court as well as data in the EIS show that pipelines and their rights of way could do subtantial harm to wetlands, beaches, the Pine Barrens of New Jersey and other fragile areas." (IA. 65)

These findings, together with the fact that there has been already substantial opposition and litigation by a number of states against the program because of these very real concerns, led the Court to the reasonable conclusion that it is likely that states will exercise their regulatory powers to prohibit or restrict pipelines and onshore facilities necessary to the OCS development program. For example, the Court found:

"A state decision banning pipelines is not inconceivable given the substantial environmental impact that a pipeline and oil spillage from a pipeline may have on coastal lands. Uncontroverted evidence indicated that a million barrel spill was possible before automatic shut-off equipment took effect." (J.A. 65)

Such a reasonable determination hardly deserves the sobriquet "imaginery," "artificial" or "strained". Given the facts, the determination that confrontation between state and federal policies is likely is the most logical and supportable conclusion the Court could come to. The Court was equally correct in recognizing that such confrontations could result in aggravated environmental harm, different from the basic "environmental assumptions" (J.A. 64) of harm on which the EIS was based.

The record reflects that the possibilities of state-federal confrontations were raised by both the states in their comments on the draft environmental statement on Lease Sale 40, but were never treated in the final EIS. It further reflects that the matter was raised in testimony before Judge Weinstein, and in the briefs submitted by counsel.

In III EIS 224 (item 49), the State of New York raised the possibility of state opposition in February, 1976 in its comments on the Draft Environmental Impact statement, where it pointed out that states may not approve pipelines. The State of New Jersey raised the issue in Commissioner Bardin's letter to the

Department of Interior (III EIS 241 at p. 242) where he pointed out that New Jersey was evaluating pipelines as a risk to public safety, to the tourist industry, or to other important resources of the Atlantic Coast. Most graphic was the comment from the State of Maryland (III EIS at p. 295), which by itself is almost a three sentence precis of Judge Weinstein's opinion:

"If the EIS suffers from a single pervasive failing, it is that shallow lip service has been paid to concerns felt deeply by coastal communities. Assumptions on which the analysis is based have been chosen to circumscribe hard choices which must be made. The EIS will not be fully satisfactory until it wades into the surf of the hard decisions and emerges with descriptious of the hard choices that are faced by the public, and all levels of government."

Delaware, also pointed out, in its comments on the impact statement (III EIS 288, item 406) that water supplies are a major Delaware concern.

There was testimony given at the hearing by NRDC's witness,

Professor Mitchell that New Jersey particularly would have great

difficulties in permitting petrochemical plants, pipelines, and

other polluting onshore facilities to locate in or near its

coastal areas, for reasons such as insufficient water supply(J.A.297,

331,354,367,379); such facilities would injure New Jersey's

famous and ecologically sensitive Pine Barrens (J.A.343-44);

such facilities would injure the recreational nature of

communities such as Cape May(J.A.338,377,398); the planning

capacities of smaller counties and communities, and their support services, would be overwhelmed (J.A. 300, 345-46).

Dr. Mitchell also testified that refineries have repeatedly been rejected by coastal communities. (J.A.303, 356).

Mr. Jarmer, planning director of Cape May County in New Jersey, pointed out that Cape May, as one such coastal community, would oppose a refinery as being incompatible with the community as a resort area. (J.A. 682)

Furthermore, contrary to the arguments of appellants,

Dr. Mitchell repeatedly stated on cross-examination that states

and localities do have "bottom line" control over land use

within their jurisdiction. (J.A.410, 417-19.)

Moreover, he indicated specifically that the problems with the locating and laying of pipelines might very well lead to the use of tankers instead. (J.A. 346-47)

In addition, the federal appellants counsel, in his cross-examination of Dr. Mitchell repeatedly established that the federal government was aware of the extent of local and state controls during the hearing. (Id.)

Thus, appellants claim that the record is devoid of consideration of this issue of potential state-federal policy conflict is simply inaccurate.

The issue of confrontation between state and local land use policy and federal OCS policy is a major one, and Judge Weinstein properly found that it was not dealt with adequately in the EIS. Nor were the consequent environmental harms of such a confrontation adequately considered in the PEIS or the EIS on Lease Sale No. 40.

Contrary to the defendants' arguments, the PEIS and the EIS on Sale No. 40 nowhere, except in two passing references, one of which is in a footnote, allude to the confrontation of state and local decisions with the federal leasing program and to the consequences of such a confrontation. (Vol. II, pp. 20 ftn., 30.) Nowhere is the very great likelihood of such confrontation discussed. Nowhere are the various ways in which states and localities may exercise their options to foreclose the program discussed. Nor is the range of environmental effects such state or local actions could engender adequately considered.

The discussion of specific state statutes is in I EIS 39-61,
State and Local Programs, and in II EIS 426-430, State Regulation.
The Volume I discussion mentions the fact that states have statutes affecting coastal development and pollution control.

Several of the state statutes, cited in the appendix to the District Court's opinion, however, are not even mentioned. \frac{1}{\sqrt{}}\)
Furthermore, there is no discussion or analysis of how these statutes could affect the leasing program. The discussion is devoid of any consideration of how the statutory goals and policies conflict with the leasing program and may well be used to restrict pipeline or onshore OCS development.

It is extremely revealing that the Volume II discussion of state statutes is in the section on <u>mitigation</u> of adverse environme tal impacts of the leasing program. These state statutes, as well as regional and county planning functions which are also mentioned, are thus portrayed as means of protecting and enhancing environmental quality when, in fact, as the District Court reasonably found, the exercise of power under these statutes may well result in a system environmental harm from the leasing program, e.g. tank as rather than pipelines, with consequent increased oil spillage.

Neither section attempts to discuss how these state powers and the specific leasing proposal are expected to interrelate.

<sup>1/</sup>New York's Mineral Resources Act, Title 23 of the ECL; New Jersey's Hackensack Meadowland Reclamation and Development Act; Pinelands Environmental Council; Delaware's Underwater Lands Act

While there are scattered statements throughout that onshore development will be subject to state or local regulation, EIS never takes the next essential step, which is to discuss the probable impacts of these laws and regulations on the leasing proposal if they ran counter to what the EIS anticipates. One example of the kind of environmental harm which could result from the exercise of state powers could be the creation of new refineries or other onshore facilities if states having existing refineries refuse to accept new pipelines.

The federal defendant and NOIA have failed to produce any evidence that the topic of concern to the court below was meaningfully dealt with in the EIS. In the federal defendant's brief, p. 16 ftn., the government states:

There are numerous other places [beside pp. 30-31] in the sale No. 40 EIS where the effect of ultimate coastal state land use control and the environmental impact of such control upon sale No. 40 and the oil and gas development in the Mid-Altantic is discussed, including

The brief then goes on to cite numerous pages in both the EIS and the PEIS, each of which upon examination fails to support the proposition it is cited for. The same is applicable to the EIS citation relied on in NOIA's brief, pp. 24-36.

Following is an analysis of these citations.

1. Citation in Volume I, Sale 40 EIS true.

## EIS Reference

p. 15	No discussion of effect of state controls -
	it mentions the stipulations which are not
	state controls.

- p. 17 Nothing about effect of state controls.
- pp. 39-49 This is the discussion of state programs described above. As indicated, it describes the existence of controls, not their impact on the offshore oil program.
- 50-52 Same
- 58-61 Same
- 2. Citations in Volume II
- 10-11 No discussion of state statutes or their effects.
- 17 Same
- Tankers may be used if pipelines are not economically or technically feasible. Footnote mentions that receptivity of state and local jurisdictions would be needed. However, no discussion of likely acceptability of pipelines to states or localities.
- 426-430 State regulations no discussion of effect on leasing program
- 434 Same

## EIS Reference

450-451 452-4-3 455-457	Mitigation of onshore facilities discussed. This does discuss how state and local controls can dictate the location of onshore facilities. However, there is no mention of what the impact of such regulations might be if they were not in conformance with the leasing proposal.
463-464	Lease stipulation providing shipping of oil by pipelines if technically and economically feasible. No mention of effect state regulation restricting or prohibiting pipelines could have on efficacy of stipulation.
476	Adverse effects of pipelines on wildlife - no mention of state regulation.
477	Adverse impacts on wetlands from pipelines mentioned - no mention of state regulations.
485	Land uses - regulations and CZM plans men- tioned - no discussion of how regulations or plans could be used to affect character of leasing program.
502-505	Alternative of deleting tracts and resultant reduced impacts discussed. Nothing about regulations.
509	Effect of smaller sale discussed. State controls not discussed.
516-519	Alternative of delaying sale until CZM plans in place discussed and rejected. No discussion of use and effect of current state laws or of CZM plans on the leasing program.
584-590	This discusses the federal regulation requiring submission of development plans by the oil companies to states. No discussion of currently existing state laws or controls and their likely effect on the program.

# 3. Citations in Volume III

# EIS Reference

420	The real particular and the second second	
	11-12	Summarizes general issues raised at public hearing.
	18	Assumption of decrease in tanker traffic discussed. State controls not discussed.
,	24	Discussion of comment that onshore impacts section of EIS inadequate. No mention of state controls
	25	Same
	26	Same
	27	Same
	30-31	Discussion of the pipeline corridor studies. No mention of state controls or effects of their use to restrict pipelines.
	32	Same
	45	Discussion of land and water conservation fund. No mention of state controls or environmental effects on program.
	61	Mention of comments on CZM plans. No discussion of effects on program.
	62-3	Comments that Federal - State cooperation should be increased and consultation encouraged mentioned. No discussion of state controls.
	64	Comments that state, county and local statutes should not be bypassed are mentioned. EIS says state statutes will control siting, but does not discuss how they may be used to affect program.

4. Citation in Vol I, Programmatic Impact Statement, (PEIS) where appellants claim reference is made to analysis of state controls and the effects of their use on the program

#### PEIS Reference

Describes alternative modes of transporting oil and gas.

- No discussion of state controls or possible effects of state controls on use of pipelines as against tankers.
- 131-31 Lists state coastal management legislation with no suggestion of possibility of state action interfering with use of pipelines.
- 5. Citations in Vol. II

## PEIS Reference

- General discussion of oil spill impacts.
  No discussion of state controls or possible effects of state controls or use of pipelines as against tankers.
- 56-60 Same
- Mentions state and local jurisdiction of onshore pipeline <u>location</u> but no mention of possible effect of such jurisdiction on use of tankers instead of pipelines.
- 774 Comments by State of Maryland. No BLM response.
- 908-909 Comments by State of New Jersey. No BLM response.

#### PEIS Reference

951-52 Comments by State of New York. No BLM response.

1004-05 Comments by State of Virginia. No BLM response.

The inescapable conclusion is that the court below was correct Nowhere in the PEIS or in the EIS is the likelihood of state or local utilization of their recognized powers in a confrontation situation discussed nor are the adverse effects of such confrontation adequately considered. The prime assumption is that pipelines will be used, absent a small strike, and that onshore facilities will be permitted to locate in the coastal states. As discussed above, this suggestion is wholly misleading in light of the present state and local opposition to the leasing program.

The court below was obviously familiar with the impact statement, and with its references to pipelines and tankers, all set out in Appellants' briefs to support the claim that the problem of concern to the Court was considered. As a matter of fact, the Court itself refers to most of them (JA. 67) as the basis of its criticism that with respect to this problem the EIS is blind. "Even after public hearings criticizing the lack of specificity in discussion of pipelines, there was no discussion and apparently

no real awareness of the fact that state laws may severely restrict pipelines and related onshore facilities." (JA 72-73)

The Court has put its finger on the central problem of federalism -- the relationship and possible conflict between sovereign states on one hand, exercising traditional police powers to regulate land uses and the delegated sovereignty of the federal government, exercising its traditional governance over the offshore lands and its ability to guide national energy policy. It is hardly an abuse of discretion for the Court to ask the Secretary charged with directing the activities of one of the two protagonists to detail and consider under NEPA, the law governing this arena, what the effect of the other protagonists powers and propensity to cooperate or oppose will be on the Secretary's program. Where the Court finds no meaningful discussion of the problem, it is not an answer to list the number of references to state statutes or to tankers and pipelines, or the list of critiques in Volume III, which the Court showed went largely unanswered. Appellants cannot point to any discussion or analysis which shows what the problem really is, and how the Secretary could propose to handle it. That is what is meant in NEPA by detailing impacts and means of mitigation, and the crucial set

of impacts and mitigating measures referred to by the Court is missing.

Accordingly, the Court's articulation of the EIS' failure to analyze state regulatory controls as a significant issue was both perceptive and correct and its finding was not an abuse of its discretion.

One other circumstance that explains the District Court's concern that states are likely to use their powers in ways not anticipated or analyzed by the Secretary is that the EIS understates the adverse impacts that the program will have on their areas. The EIS' general conclusion is that the impacts will be very light, that only a little land will be used, (e.g. only 265 acres in coastal counties) and that impacts on water use, pollution, urban conditions will be negligible.

Everyone else believes to the contrary, and this fact was made clear to the Court from many sources.

For example, the CEQ concluded, in its report to the President entitled, "OCS Oil & Gas - An Environmental Assessment," Summary pp. 149, 152 (April 1974) that:

"Outer continental shelf oil & gas production will result in onshore development of huge refineries, petrochemical complexes, gas processing facilities, construction industries, and other service operations. This development will create jobs, increase income, shift populations, change residential and commercial development and land use extensively and degrade the environment."

The U.S. Environmental Protection Agency, in its comments upon the draft impact statement, stated:

'The onshore impacts of the proposed lease sale could be most significant due to a high population density and the valuable recreational resources and wildlife refuges on the East Coast." III EIS 139

As another example, the EIS claimed that only 160 to 645 acres of land would be taken up by the whole Sale No. 40 program (I EIS 18; II EIS 278-81.) Yet testimony by Dr. Mitchell, plaintiff's witness, (J.A. 360 ), confirmed by defendant's witness Wenstrom (J.A. 785-797 ) showed that more than 12,000 acres of mainly coastal lands would be committed -- an irretrievable commitment of resources not detailed in the impact statement. Especially provocative, in this sense, was the avoidance by the EIS of any discussion of the laying of pipelines from their onshore impact point to the oil refineries. All of the complexity of trying to lay pipelines in urban areas, including traffic disruption, right of way acquisition, and environmental harm from spills was brought out by Dr. Mitchell (J.A.342-345 ), and not refuted by anyone. It had certainly to be one of the reasons the District Court recognized that local opposition to pipelines might be strong. If they only disrupt, and do not pay revenues, they will hardly be popular in the communities they need to pass through.

Another concern of localities that would have led the Court to its conclusion of possible confrontations is the threat of damage to coastal areas from development. In discussing the inadequacy of the EIS, testimony by various witnesses showed that Cape May County and Atlantic County in New Jersey, and Northhampton County in Virginia, and other areas, have extensive coastal wetlands that are fragile and easily damaged. Dr. Smalley, defendant-intervenor's witness, who said he was an expert on Louisiana's coasts, admitted on cross-examination that Louisiana in the past 20 years has lost an average of one square mile deep across its entire coastal front as a result of damage and erosion of all kinds, and that he had calculated that more than forty per cent of the damage came from the oil, gas and sulphur industries. (TR 2262).

Smalley also admitted that he knew of 50 to 100 major petroleum and petrochemical plants in the coastal parishes of Louisiana. (TR 2264)

Local citizens and their officials are the ones who would take the brunt of these impacts. When the Secretary produces an EIS that says the impacts will not happen, the local people know they are left to their own laws and powers to protect themselves.

Another subject may well also be the cause for local concern over OCS development. Dr. Mitchell was the only witness to testify about the cumulative impacts of the program on the Mid-Atlantic area. His testimony stands unimpeached and uncontradicted that the EIS treatment of cumulative impacts (II EIS 372) is wholly inadequate. The standard for discussion of cumulative impacts is found in NRDC v. Callaway, 524 F2d at 88, where the Court stated

"NEPA was, in large measure, an attempt by Congress to instill in the environmental decisionmaking process a more comprehensive approach so that long-term and cumulative effects of small and unrelated decisions could be recognized, evaluated and either avoided, mitigated, or accepted as the price to be paid for the major action under consideration."

When judged in light of the purpose and intent of NEPA, as interpreted by this Court, the discussion of cumulative impacts in the EIS is grossly deficient. When one cuts through the excess verbiage, the cumulative impacts section essentially reduces to a few sentences:

".. However, beyond quantifying the primary, most direct impacts (e.g., amounts of drilling muds which may be used, numbers of employees directly associated with primary facilities), quantifications of impacts are very difficult to estimate. The primary impacts react with numerous other factors which differ from specific area to specific area and whose relationships are often poorly understood...Quantifying cumulative impacts of this proposed sale and other possible

sales becomes even more difficult....It is possible that if the Secretary decides to hold this proposed Mid-Atlantic lease sale, and decides thereafter to hold a North Atlantic lease sale presently proposed, there could be come cumulative impacts resulting from the operations generated by these two sales. Similarly, there could possibly be some cumulative impacts resulting from a South Atlantic lease sale, should the Secretary decide to hold OCS Sale No. 43 presently proposed.... At this early stage of intensive study and analysis of potential environmental impacts of proposed lease sales No. 42 and No. 43, it is not possible to make a definitive statement with respect to the potential environmental impacts of these sale proposals, including any potential cumulative impacts " II EIS, pp. 375, 376, 378

To the contrary, Dr. Mitchell testified that cumulative impacts were capable of prediction and assessment within reasonable parameters, and he proceded to explain them.

Dr. Mitchell pointed out that if oil is found in large quantities in the Mid-Atlantic and more in the Georges Bank (North Atlantic), the Georges Bank oil would be added to the Mid-Atlantic refineries, for there are no large refineries in New England, and sites have been rejected in Maine and New Hampshire (Mitchell JA 356). Thus, Dr. Mitchell showed that even larger land, water, power and water and air pollution demands would be placed on the central industrial complex on both ends of New Jersey, and that none of this was even mentioned in the impact statement.

Dr. Mitchell also pointed out that if oil is found in

the North Atlantic and refineries do not get built in New England, that oil would be stored in tanks on the platforms, and brought in by small tankers, not pipeline, right past the entire stretch of Long Island's beaches (and often New Jersey's beaches too) along the most heavily trafficked sea lanes in the world, thus increasing sharply the dangers of oil spillage, (JA 393-394). Dr. Mitchell also had some figures, uncontradicted by any one, (and developed by the Federal EPA) of the extensive money damages resulting from the reaching of oil spills. Aside from any question of whether platform spills will ever beach (about which Dr. Mitchell did not testify) the risk of damage from tanker spills still remains high, and will go very much higher if the strikes multiply, so that the impacts accumulate. Future strikes, to New Jersey, might well mean more pollution and environmental degradation than its localities will choose to bear. The foreseeable hostility to the cumulative effects of the OCS program is another reason why the court below was correct in concluding that state and local governments may oppose the program and bring about damage to the environment not considered in the EIS.

The oil industry appellant, NOIA, shows a fundamental misconception of the CZMA when it argues that it can only be an instrument of federal-state cooperation, and that coastal zones management plans may not be used to restrict the OCS program. Sec. 308(i) of the CZMA reads

"The Secretary shall not intercede in any land use or water use decision of any coastal state with respect to the siting of any energy facility or public facility by making siting in a particular location a prerequisite to, or a condition of financial assistance under this section."

Thus, a fair reading of the CZMA must recognize that while the federal government is using the balm of grants in aid to assist the states when they are plagued by OCS onshore development, or to encourage them to accept it, the government has been told to keep its hands off the land use decisions of the states, so that they are free to make decisions which may affect the Secretary's program in ways he did not anticipate and analyze in the impact statement.

NOIA's brief also misinterprets Dr. Mitchell's testimony, to try to create out of it what it was not. What Dr. Mitchell had reference to in the testimony quoted by appellant was that in California, the Secretary, frustrated by a California land

use decision, was proceeding to permit Exxon to develop an undesirable facility outside California's three mile limit, where oil spills from it could damage the Santa Barbara coast. Under that circumstance, the Secretary indeed will have to bear the ultimate responsibility if Santa Barbara's coast is destroyed - which is the point Dr. Mitchell was making. He clearly did agree that the land use decisions were the state's (J.A. 410 ).

Equally unsupportable is appellant NOIA's argument that because some of the comments indicated that pipelines are preferable to tankers, a state will not oppose pipelines. There is no evidence to indicate that a state or locality, when faced with a complex consisting of pipelines, gas separating plants, processing plants and downstream petrochemical plants making, for example, rubber or pesticides, will not opt for strenuous regulations and restrictions. NOIA argues with the hope of those who believe that their money will ease the path to all their goals, but the evidence has shown that there are many in the coastal areas who are not so easily persuaded.

The dispute between California and the Department of the Interior, aired and making headlines since the decision of the court below, indicates California is refusing to allow Alaskan oil to be landed in California for transhipment by pipeline, directly contrary to the federal government's and oil industry's expectations. Judge Weinstein clearly possesses more prescience than appellants. This is precisely the kind of situation that he demonstrated was not analyzed in the EIS, and makes it inadequate under NEPA.

Lastly, footnote 27 on p. 60 of NOIA's brief, dealing with a claim of possible Federal supremacy overriding the states must be answered. If indeed this is a possibility, it surely may change the nature of the federal program and its administration in ways directly contrary to the manner the Secretary dealt with the question of land uses in the impact statement. Certainly, this issue was never discussed in the EIS or PEIS, and the Secretary created a wholly different impression of the ultimate authority over pipeline routes and onshore impacts. If the Secretary intends to take this position, he should be required to amend the impact statement to analyze it?/

In the court below appellees presented evidence and arguments as to the inadequacy of the impact statement under NEPA, that have not been presented here. Appellees do not abandon those arguments, for appellees consider them to have sufficient value so as to merit sustaining the decision of the court below.

IN HOLDING THAT THE EIS FAILS TO MEET THE REQUIREMENTS OF NEPA, THE DISTRICT COURT DID NOT MAKE A 'CLEAR MISTAKE' OF LAW AND THE DECISION FALLS WELL WITHIN THE 'RULE OF REASON'

The National Environmental Policy Act provides that a detailed statement by the responsible official must be included by all federal agencies in every proposal for major federal action significantly affecting the quality of the human environment.

42 U.S.C. §4332 (2)(C). Compliance with this procedure is required from every federal agency to the fullest extent possible, Calvert Cliffs' Coordinating Committee v. AEC, 449 F.

2d 1109 (D.C. Cir. 1971), cert. denied, 404 U.S. 942 (1972);

42 U.S.C. 4332.

A variety of sources make clear precisely how important and mandatory the requirements of Section 102(2)(C) of NEPA are and to whom they apply. Preparation of an impact statement is the only way to "...ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project..." Calvert Cliffs', supra, 449 F. 2d at 1114. It is the only way in which the federal agency can "give serious weight to environmental factors in making discretionary choices" and ensure that the EIS is more than a "mere token effort." Monroe County Consertion Council v. Volpe, 472

F. 2d 693, 697 (2d Cir. 1972).

The Second Circuit has declared:

"It is absolutely essential to the NEPA process that the decisionmaker be provided with a detailed and careful analysis of the relative environmental merits and demerits of the proposed action and possible alternatives, a requirement that we have characterized as 'the linchpin of the entire impact statement,' Monroe County Conservation Society v. Volpe, 472 F. 2d at 697-98". NRDC v. Callaway, supra, 524 F. 2d at 92-93

See also, Chelsea Neighborhood Association v. U. S. Postal

Service, 516 F. 2d 378 (2d Cir. 1975); Monroe County Conservation

Council, Inc. v. Volpe, supra, 472 F.2d at 697 (NEPA is, at the

As stated in <u>Silva v. Lynn</u>, 482 F. 2d 1282, 1284-1285 (1st Cir. 1973), the EIS thus serves at least three purposes:

"First, it permits the court to ascertain whether the agency has made a good faith effort to take into account the values NEPA seeks to safeguard. To that end it must 'explicate fully its course of inquiry, its analysis and its reasoning.'

very least, 'an environmental full disclosure law.')

Second, it serves as an environmental full disclosure law, providing information which Congress thought the public should have concerning the particular environmental costs involved in a project. To that end, it 'must be written in language that is understandable to non-technical minds and yet contain enough scientific reasoning to alert the field of their expertise.'

Finally, and perhaps most substantively, the requirement of a detailed statement helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug."

A failure to prepare an adequate EIS renders these goals nugatory.

Mr. Justice Marshall, in considering whether to vacate the stay in this proceeding, stated, with respect to NEPA:

"Just this past Term, in Kleppe v. Sierra Club, U.S. (1976) we had occasion to examine the purposes and requirements of NEPA. Although we disagreed on certain issues, we were unanimous in concluding that the essential requirement of NEPA is that before an agency takes major action, it must have taken a 'hard look' at environmental consequences. Kleppe v. Sierra Club, supra, at n.21 (1976), quoting Natural Resources Defense Council v. Morton, 458 F. 2d 827, 838 (DC Cir. 1972). In evaluating the adequacy of environmental impact statements, the courts of appeals consistently have enforced this essential requirement, tempered by a practical "rule of reason." As the Court of Appeals for the Second Circuit has explained:

'[A]n EIS is required to furnish only such information as appears to be reasonably necessary under the circumstances for evaluation of the project rather than to be so all-encompassing in scope that the task of preparing it would become either fruitless or well nigh impossible.' Natural Resources Defense Council v. Callaway, 524 F. 2d 79, 88 (CA2 1975)." (footnote omitted.) State of New York v. Kleppe, 45 U.SW 3161 (Aug. 19, 1976)

The court below properly applied NEPA in reaching its finding that the EIS was inadequate. What the District Court found was that the EIS had failed to take "a hard look" at the environmental consequences likely to result from state actions taken to restrict OCS oil development. The court held that "No meaningful discussion of this vital dimension of the environmental problem is contained in the final EIS OCS Sale No. 40 or the PDOD." (J.A. 76

Appellees have demonstrated above that this is indeed true.

In reaching this conclusion, the court below properly applied the rule of reason. What the District Court found in its decision below was that the analysis of the existing state laws and the probable extent of their use to cooperate with or oppose the Secretary's program was both meaningfully possible and reasonably necessary for the Secretary and the public to evaluate the project, and that it was missing from the impact statement. The opinion below thus fits squarely into the holding of this Court in NRDC v. Callaway, supra.

Contrary to the claims of the appellants, it is not "impossible" for the impact statement to contain such a meaningful discussion. What the Court is asking for is an analysis of the current statutes, the range of options and alternatives open to the state and local agencies under these laws, and the range of environmental effects on offshore oil development the exercise of such options could have. Nowhere is the Secretary asked to predict the outcome of political controversies or to make any other "crystal ball inquiry." What the District Court held is that there must be analysis of likely adverse impacts based on present knowledge and information. Present knowledge and information clearly reveals that states and localities

have control over decisions which can affect the leasing program and also that there is strong opposition to the present program. Therefore, an analysis of the tools presently available to them is both "meaningful possible" (NRDC v. Morton, supra, p. 837) and "reasonably necessary" (NRDC v. Callaway supra, p. 93).

Appellants found with evident surprise and more evident disagreement that Judge Weinstein commented that NEPA is an "environmental full disclosure law," perhaps forgetting that the very phrase was originally struck by this Court in Monroe County Conservation Council, Inc. v. Volpe, 472 F2d 693, 697 (2nd Cir. 1972), and that it has been widely cited with approval. See, for example, Silva v. Lynn, 482 F.2d 1282, 1284-85 (1st Cir., 1973.)

Nothing in the other cases cited in appellant NOIA's brief (pp. 39-46) detracts from this view. The analysis being called for is not a "crystal ball inquiry", nor is one secretary being asked to "forsee the unforseeable", nor is it a "predictive venture" - it is simply an analysis of presently existing statutes and how their use may interfere with the program and affect the environment adversely. Moreover, the defect is not a "fly speck", or a minor defect - but a major

issue of state-federal relationships.

In light of the caution with which Judge Weinstein reviewed other aspects of the impact statement and held them adequate, and the caution with which he approached the idea of interfering with the Secretary's program (J.A. 47,71), the decision must be regarded as careful application of the rule of reason.

Appellants erroneously state that there is case law for excusing "the utter failure of an EIS to discuss a particular topic on the ground that it was not raised by plaintiffs in the comments which they made during the administrative proceedings prior to final publication of the EIS." NOIA appeal Brief, 45. Plaintiffs have shown that they did raise "the pipeline/tanker issue" in hearings on the draft EIS for Sale No. 40, but even if they had not, this would not excuse the Secretary from not discussing this issue adequately in the final EIS. The most extreme position any court has taken is that such failure of plaintiffs to comment "may be taken into consideration in passing upon the adequacy" of the EIS. Natural Resources Defense Council v. TVA, 367 F.Supp. 128, 131 (E.D. Tenn. 1973).

In Sierra Club v. Morton, 510 F.2d 813, 826 (5th 1975), the court explicitly rejected the theory that plaintiff's failure to comment would excuse EIS deficiency. In the third case cited by appellees, NOIA Brief, 45, the affirming Eighth Circuit Court of Appeals made explicit that it was not adopting the view that, as a matter of law, plaintiffs failure to comment excused defendants from having filed a defective EIS and, in affirming the lower court's denial of an injunction, noted that such failure to comment was not a predicate of their decision or of the District Court's; on the contrary, the EIS was found intrinsically adequate. Environmental Defense Fund v. Froehlke, 368 F.Supp. 231 (W.D. Mo. 1973), aff'd on other grounds, 497 F.2d 1340 (8th Cir. 1974). Finally, no decision in this circuit has even considered plaintiffs failure to comment on a topic as tangentially relevant to assessment of an EIS, let alone held that it excused a defendant from discussing that topic inadequately.

IN FINDING THAT PLAINTIFFS WOULD SUFFER IRREPARABLE HARM, THE COURT BELOW DID NOT ABUSE ITS DISCRETION OR MAKE A CLEAR MISTAKE OF LAW

The standard that appellees had to meet to obtain preliminary injunctive relief is that they had to demonstrate a likelihood of success on the merits and that they would suffer irreparable injury if the injunction were not granted. See National Association of Letter Carriers v. Sombretto 449 F2nd 915 (2nd Cir. 1971.) The court below held that appelles had met the standard, citing Scherr v. Volpe 466 F2nd 1027, 1034 (7th Cir. 1972,) Environmental Defense Fund v. TVA 468 F2nd 1164, 1184 (6th Cir., 1972) and Izaak Walton League of America v. Schlesinger 337 F. Supp. 287, 295 (D.D.C. 1971).

In its order granting the stay of the injunction, so that the event of the lease sale might take place, this Court stated: "We find nothing in this case which satisfies us that the August 17, 1976 sale, in and of itself, will cause appellees any irreparable injury." (JA 210 ) The court distinguished the Izaak Walton and Scherr cases (supra) on the grounds that in this case the sale would not cause immediate injury, while in

those cases, acts that would cause immediate environmental harm were enjoined. While the Court held that the act of opening and accepting the bids itself was not an event of irreparable harm to appellees, it took no position on whether subsequent events would do that harm. In colloquy with counsel, this Court did point out during the argument, that should the opinion of the court below be affirmed, leases entered into in violation of NEPA could be held invalid.

Mr. Justice Marshall, on reviewing this question when appellees sought to vacate the stay of this Court, stated:

"The Court of Appeals concluded that plaintiffs would not be irreparably injured if the Secretary were permitted to open the bids. I cannot say that the court abused its discretion. It is axiomatic that if the Government, without preparing an adequate impact statement, were to make an 'irreversible commitment of resources,' Natural Resources Defense Council v. NRC, Nos. 75-4276, 75-4278, slip op.at 3934 (CA2, May 26, 1976), a citizen's right to have environmental factors taken into account by the decisionmaker would be irreparably impaired. (Footnote omitted.)

\* \* \*

"In the instant case, however, the Court of Appeals apparently decided that the opening of bids does not constitute an 'irreversible commitment of resources.' I am unprepared to say that the court was wrong in so holding. In the first instance, it is quite clear that the actual opening of the bids does not involve a commitment of any kind, since the Secretary reserves the right to reject all bids. Thus it is not until a bid is accepted -- which may not happen for 30 days -- that an irreversible commitment is even arguably made. Moreover, even after the bids are

accepted, I cannot say that the Court of Appeals would be without power to declare the leases invalid if the court determined that the Government entered into leases without compliance with the requirements of NEPA." (Footnote omitted.)

The bids were opened on August 17, 1976 and have been accepted or rejected by the Secretary. The next step is that leases be signed, giving vested rights to drill for and develop oil and gas, and that exploratory drilling begin, which can happen within the next few months.

It is at this point, when leases are signed and lessees begin to drill, that irretrievable commitments of resources commence, as options are foreclosed and irreparable harm to the environment occurs. For this reason, a preliminary injunction against the signing of the leases and the conduct of any drilling must be upheld.

Although not all courts have applied the same standard of irreparable injury to NEPA cases, there is one principle that has been invariably applied in granting or denying injunctive relief, which Justice Marshall took note of in this case:

"It is axiomatic that if the government, without preparing an adequate impact statement, were to make an 'irretrievable commitment of resources,'" Natural Resources Defense Council v. NRC, Nos. 75-4276, 75-4278, slip op. at 3934 (CA2, May 26, 1976), a citizen's right to have environmental factors taken into account by the decision maker would be irreparably impaired."

"For this reason, the lower courts repeatedly have enjoined the Government from making such resource commitments without first preparing adequate impact statements."

"Indeed, this past Term, in Kleppe v. Sierra Club, supra, we indicated that it would have been appropriate for the Court of Appeals to have enjoined the approval of mining plans had that court concluded that 'the impact statement covering [the mining plans] inadequately analyzed the environmental impacts of, and the alternatives to, their approval.'"

As Justice Marshall indicated, this Court only recently held, with respect to another major energy program -- the development and licensing of commercial processing of plutonium for nuclear reactors -- that to allow interim licensing to proceed would involve:

"irretrievable commitments of resources which would serve
to tip the balance away from environmental concerns and
prejudice the final agency decision. In Conservation Society I, supra, this court warned that we must consider the
possibility that there are 'options often impercaptibly
foreclosed by fragmented growth, 'already being made 'would
curtail subsequent broad-scale assessment of alternatives.'
Id. at 935. In Natural Resources Defense Council, Inc. v.
Callaway, supra, this court observed that it is the 'cumulative environmental impact which must be evaluated as a whole.'
524 F.2d at 89." Natural Resources Defense Council v. NRC,
F. 2d \_\_\_, 8 ERC 2065, 2079 (2d Cir. 1976.)

The Court further observed that federal agency action (like granting a lease) which might tip the balance away from environmental concerns before compliance with NEPA has been completed "has been branded as making a 'mockery' of the procedural man-

dates of NEPA; see <u>Natural Resources Defense Council v. Callaway</u>, supra 524 F2d at 92."

An irretrievable commitment of resources in the form of actual physical harm to the environment can come from exploratory drilling. The Council on Environmental Quality has stated that "Exploratory drilling is one of the most hazardous steps in developing offshore oil and gas" (J.A. 1377). This is when a "blow out" may create a huge spill without devices being in place to shut it off. (J.A. 1377) Absent an injunction, exploratory drilling could occur almost immediately and there is uncontradicted testimony in the court below that there could be a strike within a year of the lease sale. (J.A. 298-9).

The record in the hearing amply demonstrated that activity under the leases generates widespread irretrievable commitments of resources onshore as well as offshore.

The court below found, after hearing this testimony, that

"once a strike is made many of the corollary activities will begin, regardless of whether or not the states or federal government have approved production plans. These include siting, construction and operation of platform yards, pipe coating plants and other installations, and land acquisition for new or expanded refineries. This commitment of resources is of the precise sort that should not take place before compliance with NEPA." (JA 84

Thus, environmentally degrading actions may be taken immediately, absent injunctive relief.

Where irreversible commitments of resources are about to take place, the Courts have consistently sustained the axiom referred to by Justice Marshall, even in the face of strong countervailing

national interests. While appellants have urged that these countervailing interests should prevail, this Court has refused to be so stampeded. This Court's holding in Natural Resources Defense Council v. NRC. F2d ,8 ERC 2065, 2080 (2d Cir 1976) is directly on point:

"It is undisputable that the motives of the Commission, to develop new sources of energy and to recycle dwindling uranium reserves, are highly commendable; however, those national needs cannot outweigh the farreaching national concerns embodied in NEPA." (emphasis added.)

See also <u>Calvert Cliffs</u>, supra; <u>Greene County</u>, supra; <u>NRDC v</u>.

<u>Callaway</u>, supra; <u>NRDC v</u>. <u>Morton</u>, supra.

 $\underline{\mathbf{v}}$ .

THE APPROPRIATE RELIEF ON AFFIRMANCE OF THE COURT BELOW IS INJUNCTION AGAINST EXECUTION OR PERFORMANCE OF THE LEASES OR INVALIDATION OF THE LEASES IF THEY HAVE BEEN SIGNED

If this Court affirms the court below, it must fashion an amended remedy, for the initial injunction against the holding of lease sale 40 is no longer appropriate.

If, by the time this Court renders its decision, the Secretary has not executed the leases, the problem is simply enough solved by enjoining their execution and further proceedings involving lease sale No. 40. The cases are legion that hold injunction

to be the proper remedy, where it is timely, NRDC v. Callaway, supra, (2d Cir.), Chelsea Neighborhood Assoc., supra, (2d Cir.), Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849; Natural Resources Defense Council, Inc. v. Monton, 458 F.2d 827 (D.C. Cir. 1972); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F. 2d 232, 235 (4th Cir. 1971); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972); Lathan v. Volpe, 455 F.2d 1111 (9th Cir. 1972); Environmental Defense Fund v. Comps of Engineers, 324 F. Supp. 878 (D.D.C. 1971); Environmental Defense Fund, Inc. v. Corps of Engineers, 331 F. Supp. 925, 927 (D.D.C. 1971).

Injunction is also the proper remedy after the act takes place, where the performance of the contract, rather than its execution may be enjoined. In Wyoming Outdoor Coordinating Council v Butz, 484 F.2d 1244 (10th Cir. 1973) the Circuit Court found that the government's violations of NEPA required that the "performance of [the timber] cutting contracts" at issue be enjoined until "impact statements be issued in accordance with" NEPA.

See also Minnesota Public Interest Research Group v. Butz, 358 F. Supp. 584 (DC Minn. 1973) aff'd 498 F2d 1314 (8th Cir. 1974)

If the leases have been executed, the court may simply declare them to be invalid, as a matter of contract law, based on a violation of statute. A bargain for a performance prohibited by a federal statute, in this case NEPA, is illegal. 6A Corbin on Contracts, 8n4,§1374 (1962).

"A contract which in its execution contravenes the policy and spirit of a statute is equally void as if made against the positive prohibitions." 15 Williston on Contracts 206, §1763 (1972)

Numerous decisions of the Supreme Court and other federal courts have found Congress has exclusive jurisdiction over the disposition of land or other property of the United States and that no such power resides in the head of an executive agency without legislation. E.g., United States v. Gratiot, 39 U.S. (14 Pet.) 526 (1841); Royal Indemnity Co. v. United States, 313 U.S. 289, 294 (1941); United States v. Nicoll, 27 F. Cas. 149, 150 (No. 15,879) (C.C.N.Y. 1826) (Mr. Justice Thompson); United States v. Utah Power and Light Co., 209 F. 554, 557 (8th Cir. 1913), aff'd 243 U.S. 389 (1917); Udall v. Oil Shale Corp., 406 F.2d 759,764 (10th Cir 1969) Ordinary law governing the sale or lease of private land does not apply to government property. The United States is not bound by the acts of its agents unless Congress has authorized those agents to act. E.g., Hart v. United States, 95 U.S. 316, 318 (1877); Utah Power and Light Co. v. United States, 243 U.S. 389, 409 (1917); Wilber Nat. Bank v. United States, 294 U.S. 120, 123-124 (1935).

These cases reflect the long-standing principle that the United States must not be deprived by private parties of public property which is "held in trust for all the people." <u>United</u>

States v Trinidad Coal and Coking Co., 137 U.S. 160, 170 (1890).

Appellant Kleppe, as Secretary of the Interior, has fiduciary responsibility under the Outer Continental Shelf Lands Act, 43 U.S.C. §§1334, 1301(e) for lands "held in trust for all the people."

Therefore, any lease executed by the Secretary while he is in violation of NEPA is invalid as violating this public 'trust.' of Kaiser-Frazer Corp. v. Otis & Co., 195 F2d 838 (2d Cir. 1952); Schoenbrod v. U.S. 410 F2d 400 (Court of Claims 1969).

## CONCLUSION

This brief demonstrates that the issuance of a preliminary injunction by the District Court based on its decision that the EIS for Lease Sale 40 violated NEPA and that plaintiffs were threatened with irreparable harm was neither an abuse of discretion nor a clear mistake of law.

Appellee NRDC show that

(a) The District Court was correct in recognizing that the issue of state and local use of their presently existing land use controls to restrict aspects of the OCS development program was a major

issue not adequately analyzed in the EIS. Furthermore, the District Court has support for this position in the record. Moreover, the concern of the court that the confrontation between state and federal governments is likely to occur has since been borne out by events in California, where state controls are indeed being used to prevent the landing of oil from Alaska, which may instead have to be shipped by tanker to Texas or Japan, contrary to federal government expectations.

- (b) The District Court did not make a clear mistake of law in finding the NEPA violation, and was squarely within the 'rule of reason' in so doing.
- (c) The District Court properly found that appellees will be irreparably injured if the program under lease sale 40 continues without prior compliance with NEPA.
- (d) The proper remedy is either to enjoin the execution and performance of the leases, or to invalidate them if they have been executed.

For these reasons, the opinion and order of the court below, dated August 13, 1976, should be affirmed, the stay of the pre-liminary injunction should be vacated, the injunction should be modified to enjoin execution and performance of the leases pending

trial, and an order should be issued invalidating any leases executed with respect thereto.

Respectfully submitted,

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September 21, 1976

# United States Court of Appeals for the second circuit

No. 76-6122

COUNTY OF SUFFOLK, COUNTY OF NASSAU, et al Appellees

٧.

SECRETARY OF THE INTEROOR, et al

Appellants

ET AL

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